

UNITED STATES
v.
GEORGE C. HOOKER ET AL.

IBLA 79-108

Decided May 27, 1980

Appeal from decision of Administrative Law Judge Michael L. Morehouse declaring lode mining claims null and void for lack of the discovery of a valuable mineral deposit. U 10748.

Affirmed in part and reversed in part.

1. Mining Claims: Determination -- Mining Claims:
Discovery: Generally

Where, in a hearing undertaken pursuant to a contest complaint alleging the invalidity of various mining claims, the contestee affirmatively states that there is no discovery on certain of the claims, the contestee will not be heard on appeal to assert that there was a discovery on those claims.

2. Administrative Practice: Hearings -- Contests and Protest: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Rules of Practice: Government Contests

Absent a patent application, the dismissal of a contest complaint by an Administrative Law Judge does not establish the validity of the claim, but merely establishes that, on the issues raised by the evidence, the contestee has preponderated. Therefore, there is no requirement, beyond preponderation as to the issues raised by the evidence, that a mining claimant affirmatively establish the validity of a claim.

3. Evidence: Generally -- Evidence: Sufficiency --
Evidence: Weight

While the testimony of a Government mineral examiner that he or she has examined a mining claim and found no evidence of mineralization which would support a discovery, is normally sufficient to establish a prima facie case, such a conclusion must be premised on a correct standard of law. Where a Government mineral examiner applies a standard which is not correct under the law, his or her opinion as to a claim's validity can not serve, by itself, to establish a prima facie case of invalidity.

4. Mining Claims: Determination of Validity -- Mining
Claims: Discovery: Generally

Where a claim's validity is dependent upon the extent of a mineralized deposit, and where no evidence has been submitted relating to the geologic factors upon which expert opinion evidence was premised, it is proper to dismiss the Government's contest, without prejudice.

APPEARANCES: Donald F. Crain, Morro Bay, California, for the appellants;
John H. McMunn, Esq., Office of the Solicitor, U.S. Department of the
Interior, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

George D. Hooker, Donald F. Crain, and L. W. Benson have appealed from a decision by Administrative Law Judge Michael L. Morehouse, dated November 20, 1978, declaring their 12 lode mining claims 1/ null and void for lack of discovery of a valuable mineral deposit. The lands embraced by the claims were included in the Capitol Reef National Monument by Presidential Proclamation No. 3888, dated January 20, 1969. Capitol Reef National Monument became the Capitol Reef National Park by P.L. 92-207, December 8, 1971, 85 Stat. 739, 16 U.S.C. § 273 (1976).

1/ The 12 lode mining claims are the Gertrude, Lois, Hattie, Solitude, Circle C, Solitude Fraction, Deep Rock, Deep Valley, Deep River, Deep Secret, Deep Cavern, and Deep End Fraction located in portions of unsurveyed secs. 20, 28, and 29, and surveyed secs. 32 and 33, T. 33 S., 8 E., Salt Lake meridian, Garfield County, Utah.

On December 13, 1976, the Bureau of Land Management (BLM), on behalf of the National Park Service, U.S. Department of the Interior, initiated contest proceedings challenging the validity of appellants' mining claims because: "(a). The lands embraced within the claims are nonmineral in character. (b). Valuable minerals have not been found within the limits of the claim, or any one of them, of sufficient quality and/or sufficient quantity to constitute a valid discovery within the meaning of the mining law." Appellants submitted a timely answer and hearings were conducted on January 24, 1978, and September 6, 1978.

[1] Initially, we would note that while a total of 12 claims were involved in the hearing, appellants admitted that at least 10 of them were invalid. At the second hearing, the following colloquy between Judge Morehouse, Donald F. Crain, one of the contestees, and Robert D. O'Brien, the Government mineral examiner, occurred:

THE COURT: Mr. Crain, really the only claim that we are really concerned with here today is the Solitude claim, is that not correct?

MR. CRAIN: The Solitude and the Circle "C". This ore outcrop runs going from south to north. It has a beginning in the Solitude Fraction and extends on into the Circle "C" claim.

THE COURT: So that --

MR. CRAIN: As this diagram will show, your Honor, this diagram of the claims, this is the uranium ore body here which starts Solitude Fraction and then runs into Circle "C". The largest extent of it is in Circle "C".

THE COURT: I see.

MR. CRAIN: But it has a beginning --

THE COURT: In the Solitude Fraction.

MR. CRAIN: In the Solitude Fraction.

THE COURT: Does that correspond to your understanding, Mr. O'Brien?

MR. O'BRIEN: Yes.

THE COURT: So that the two claims then we are concerned with here today are Solitude Fraction and Circle "C". You are not making -- it is not your position that there is a discovery on any other of the claims here today?

MR. CRAIN: That is correct. There has been no discovery of ore regarded mineable ore on any of the other property. However, it can be assumed that this steeply dipping bed could very well go under these other claims to the east through the sidelines of those claims and extended who knows how far. But as to the actual discovery it is on this. [Emphasis supplied.]

(2 Tr. 11-13).

It is clear that appellants expressly stated that there was no discovery on any of the claims other than the Solitude Fraction and the Circle "C". In their notice of appeal, however, appellants now aver that "a valuable mineral deposit has been physically found on two of the claims (uranium) plus a deposit of very high grade refractory clay on two others. In reference to these two claims upon which, appellants now allege, exist a high grade refractory clay deposit, we would note that there is no evidence of such a deposit in the record, and its possible existence is contradicted by appellants' expressed disclaimer of a discovery on any claims other than the Solitude Fraction and Circle "C". Indeed, the only prior indication of the existence of such a deposit is found in Exh. R-9, map of the claims in which a line drawn through the Deep Secret, the Deep Cavern, and the Deep End Fraction is identified as "very high grade refractory clay." No other evidence was submitted relating to such a deposit. There has been no offer of proof that the clay present on these two or three claims can meet the refractory and other quality standards for high-grade ceramic products or is suitable for use in the oil and oil well drilling industries. See United States v. Peck, 29 IBLA 357, 84 I.D. 137 (1977). Moreover, appellants having admitted that there was no discovery on any of the claims other than the Solitude Fraction and the Circle "C" will not be heard on appeal to contend that a discovery does in fact exist. We find, therefore, that the Administrative Law Judge correctly determined that these other claims were null and void and we accordingly affirm that finding.

[2] Judge Morehouse also found that there had been no discovery of a valuable mineral deposit on either the Solitude Fraction or the Circle "C". Judge Morehouse held:

Having carefully considered the entire record, it must be concluded that the government has presented a prima facie case of invalidity, at least as of January 20, 1969, the withdrawal date, and contestees have not met their burden of establishing by a preponderance of the evidence that the mining claims involved are valid.

(Dec. at 6). As we will point out subsequently, however, there is considerable doubt both as to the existence of a prima facie case and as to whether the Administrative Law Judge applied the proper legal standard.

At the initial hearing, Judge Morehouse made the following statement to appellant Hooker:

THE COURT: Well, I will try to explain a little to you how we will proceed here. The government, the Park Service, having brought this contest, they have the obligation of putting enough evidence on to establish what they call in legal terminology a prima facie case. That means that's just enough evidence to raise some kind of presumption that this claim is invalid. Then the contestees have the burden of proving by a preponderance of the evidence that this is a valid claim. You not only have to overcome whatever case they have, but even if you overcome the government's case, in addition to that you have to show that this is a valid, good claim, that you have a valid discovery under the mining laws. You not only have to overcome the government's case, but you have to show by the preponderance of the evidence, the weight of the evidence, that you've got a valid discovery. Do you understand that? [Emphasis supplied.]

(1 Tr. 5). We do not believe that the underlined portions of the Judge's statement correctly reflect the law.

The leading case on this question is United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). In Taylor, this Board held that "[w]here * * * the contestees' evidence preponderates sufficiently to overcome the Government's prima facie case on an issue raised by the evidence, the contest should be dismissed and a ruling on the issue made by the Judge." Id. at 25, 82 I.D. at 74. The Board then hypothesized a situation in which the Government had challenged a claim on the ground that it was a common variety mineral not marketable as of July 23, 1955, and, on which issue, the contestee had preponderated. The Board noted that if the Government had not placed the present marketability of the deposit in issue, and no evidence on this question had been introduced, it would still be proper to dismiss the contest complaint:

The issue of present marketability not having been raised by the evidence could not be decided, but there would be a ruling that would establish that a prerequisite to the claim's validity, i.e., marketability as of the cutoff date of July 23, 1955, was met.

(Id.).

Implicit in this holding is the realization that dismissal of a contest complaint does not determine the validity of the claim, but merely establishes that, as to the issues raised in the hearing, the

mineral claimant has preponderated. Thus, in a hearing on a Government contest complaint, there is no requirement that a mining claimant show that the claim is valid; rather, the mineral claimant's burden is to preponderate on the issues raised by the evidence.

The one exception to this standard arises in the context of a patent application. With reference to this question, the Board in Taylor held:

If a patent application has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

(Id. at 25-26, 82 I.D. at 74). The requirement that all essential issues be determined prior to the issuance of a patent is premised on the fact that should this Board merely dismiss a contest complaint brought against a patent application, the mineral claimant could proceed to patent, and the Government might be divested of the land embraced within a claim which did not meet all of the requirements of the law. As noted in Taylor, however, this Department has an affirmative obligation to safeguard against "an unlawful private appropriation in derogation of the rights of the public." Cameron v. United States, supra.

Nevertheless, even in a patent application, a mineral claimant does not run the risk of nonpersuasion on an issue where there has been no evidence presented. On the contrary, as Taylor notes, when this Board determines that a lack of evidence on an essential issue raises a reasonable doubt as to the validity of the claim, the proper action is to remand the case for a further hearing; it is not to declare the claim invalid. At the subsequent hearing it would still be necessary for the Government to establish a prima facie case of invalidity on such essential issue before that issue may serve as a predicate to declare the mining claim null and void. Thus, even if this appeal involved a patent application, which it does not, the Judge's statement that appellant had an affirmative duty to establish the validity of the claim, beyond the duty of preponderating on the issues raised by the evidence, and failing in which the claim would be declared invalid, is in error.

While the Judge may have applied an improper legal standard in deciding the instant case, it is axiomatic that this Board is

possessed with plenary authority to examine the record de novo, applying the correct standard. See Morris v. Andrus, 593 F.2d 851, 854-55 (9th Cir. 1979); United States v. Gassaway, 43 IBLA 382, 388 (1979). It is here, however, that we must examine whether the Government's evidence was sufficient to establish a prima facie case of invalidity.

[3] The basic rule for establishing the existence of a prima facie case is that a prima facie case has been made when a Government mineral examiner testifies that he or she has examined a mining claim and found no evidence of mineralization sufficient to support a discovery. United States v. Knecht, 39 IBLA 8, 11 (1979); United States v. Fisher, 37 IBLA 193, 195 (1978); United States v. Winters, 2 IBLA 329, 335-36, 78 I.D. 193, 195 (1971); and cases cited. As this Board noted in United States v. Winters, supra:

Where a Government mineral examiner offers his expert opinion that a discovery of a valuable mineral deposit has not been made within the boundaries of a contested claim, a prima facie case of invalidity has been made, provided that such opinion is formed on the basis of probative evidence of the character, quality and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, regardless of the expert qualifications of the witness. But an expert's opinion which is premised on his belief or hypothetical assumption of the existence of certain relevant conditions, if evidence is presented that those conditions do exist, is sufficient to establish a prima facie case and to shift the burden of evidence to the contestee.

Implicit in this rule is the belief that when an expert states that he or she has examined the workings on a claim and ascertained no evidence of a discovery, the expert has reference to the proper standard of discovery. In the instant case, we have substantial doubts as to whether the proper standard of discovery was utilized in forming the Government mineral examiner's opinion.

The traditional test which this Department has utilized in determining whether a mineral claimant has met the requirements of the mining laws was formulated almost 90 years ago in Castle v. Womble, 19 L.D. 455, 457 (1894):

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

This "prudent man" test has been refined to require a showing that the claimed mineral is capable of extraction, removal and marketing at a

profit, the so-called "marketability" test. United States v. Coleman, 390 U.S. 599 (1968). Moreover, to the extent that either the land embraced by the claim or the mineral for which the claim is located has been withdrawn, it is also incumbent upon the mineral claimant to show marketability as of that date. Palmer v. Dredge Corp., 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969).

But while a mineral claimant is required to show that the material is and was on the date of a withdrawal, marketable, there has never been any requirement that actual production occur, or that a mine be established. United States v. Hess, 46 IBLA 1, 7 (1980); United States v. McKenzie, 4 IBLA 97, 100 (1971).

In the instant case, Robert D. O'Brien, the Government mineral examiner, testified that, in his opinion, a reasonable man would not be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine (1 Tr. 25; 2 Tr. 73). There is no question that this statement, having been formulated on the basis of a physical examination of the claim, would normally be sufficient to establish a prima facie case of invalidity. There were other statements made by O'Brien, however, which engender a belief that he was not applying a proper test of discovery.

The following exchange took place in the first hearing:

THE COURT: Well, let me put it this way: If you and Mr. Crain had been able to take sufficient time to go to all these samples, and all these samples had shown that there was a valuable ore, would your opinion be any different?

THE WITNESS [O'Brien]: It might be some different, but not very much, because there is no depth to it. There is no tonnage involved in this. You have a length on it, but you do not have a depth on it so that you cannot calculate a tonnage that would make it worth while to mine. The first thing you have to do in any mine you have to be able to spend money on it. You have to have some knowledge of the total tonnage that is available to mine so that you can be sure that you are going to get your money back when you put some money into it. If you are not going to get your money back, why there is no point in even attempting it. You could have an 800 foot stretch of outcrop there that will be all good ore, but if you can't give any -- the farthest you can project that stuff would be ten feet, fifteen feet, and you can't build a mine on that small a tonnage.

(1 Tr. 36-37). To the extent that O'Brien was stating that the presence of a sufficient quantity of a mineral is a necessary prerequisite

to a claim's validity, this statement is correct. We find troublesome, however, the inference that a mining claimant must know, as an established fact, the full dimensions of a mineralized deposit.

That this inference was drawn, at least by Judge Morehouse, is made clear in his decision, wherein he stated:

Mr. O'Brien testified that the only way to block out an ore deposit on these claims is to core drill along the vein or to drift into the vein and follow it so that the tonnage of the deposit can be determined with some degree of certainty. Neither one of these methods has been employed on these claims and therefore, regardless of expectations, all that is present on these claims is a prospect mine.

* * * * *

The extent of the saleable material in the vein on these claims is not known, and to project the vein to various depths with varying tonnage is pure speculation.

(Dec. at 5, 7). There has, of course, never been a requirement that a mining claimant block out a deposit to show its extent. On the contrary, this Board has expressly noted that geologic inference may be relied upon to establish the extent of a mineral deposit. Thus, we held in United States v. Larson, 9 IBLA 247 (1973), aff'd, Larson v. Morton, Civ. No. 73-119 TUC-JAW (D. Arizona 1974), a case which dealt with uranium claims:

While geologic inference may not be relied upon to establish the existence of a mineral deposit, it may be accepted as evidence of the extent of a deposit. That is, where ore has been found, the opinions of experts, based upon the knowledge of the geology of the area, the successful development of similar deposits on adjacent mining claims, deductions from established facts--in short, all of the factors which the Department has refused to accept singly or in combination as constituting the equivalent of a discovery--may properly be considered in determining whether ore of the quality found, or of any mineable quality, exists in sufficient quantity to justify a prudent man in the expenditure of his means with a reasonable anticipation of developing a valuable mine.

9 IBLA at 262 (citations omitted). Accord, United States v. Relyea, A-30909 (June 25, 1968), aff'd, Relyea v. Udall, Civ. No. 3-58-20 (D. Idaho 1970).

In the second hearing, O'Brien went further and appeared to assert that an actual mine was a necessity for a valid claim. In

response to a question from Judge Morehouse relating to what a reasonable man's expectation in 1969 might be as to the future, O'Brien answered:

Well, regardless of whether it is 1969 or right now, you have only a prospect there. You do not [have] a mine. You have expectations for developing more ore or developing some ore; whereas, as of right now you have no ore developed, or very little, with the work that has been done there today. You have a prospect. It may be good, it may be bad, I am not in a position to tell that except that I think it would be a pretty good prospect today, but it is not a mine yet. Just because its got a tunnel in it doesn't mean it's a mine. [Emphasis supplied.]

(2 Tr. 73). Judge Morehouse quoted this passage in his decision, with apparent approbation (Dec. at 6).

Thus, while the mineral examiner did purport to apply the traditional prudent man test, he also appeared to posit requirements that a mineral claimant block out a deposit and develop an actual mine as preconditions of validity. In view of this, we find it impossible to place sufficient weight on the mineral examiner's conclusion of invalidity to permit it to establish a prima facie case.

This does not end the analysis, however. While the mineral examiner's ultimate conclusion of invalidity may have been rendered fatally defective because of the application of improper standards, this in no way tainted the other testimonial evidence which he gave. Moreover, this Board has recently ruled that the presumption which arises from nondevelopment of a claim over a considerable period of time is, in itself, sufficient to establish a prima facie case of invalidity. United States v. Hess, supra. O'Brien testified that there had been no evidence of any actual production from the claims, though a tunnel had been driven in an apparent attempt to intersect the outcrop (1 Tr. 19). Appellants did not move for a dismissal of the contest complaint, but rather proceeded to put on their evidence. Thus, we must look to the totality of the evidence to determine whether appellants prevailed by a preponderance of the testimonial evidence.

[4] An examination of the evidence adduced at the hearing shows that the primary matter of concern was whether the surface showings could be projected in a manner that would show the existence of a sufficient quantity of uranium to qualify as a discovery under the mining laws. O'Brien testified that he had examined the claims on two separate occasions, the second time in conjunction with appellant Crain (1 Tr. 9-10). In the course of his second examination, he took three samples; one of the outcrop on the claims and two from a tunnel which had been driven below the outcrop which he believed intersected

the structure of the outcrop (1 Tr. 11-12). The sample taken from the outcrop assayed at .46 U[3]O[8], while the samples taken in the tunnel were assayed at .021 and .063 U[3]O[8], respectively. See Exhibit G-2. O'Brien indicated that the showing on the outcrop indicated a very good value for uranium oxide, but that two samples from the tunnel indicated only low grade values (1 Tr. 14-15).

In a subsequent exchange with Judge Morehouse, O'Brien explored the market situation which was extant in 1969:

Q. (By the Court) Do you know what the price per ton that mill in Moab was paying for --

A. [O'Brien] In 1969?

Q. Yes. For .460 uranium oxide.

A. At that time the price of uranium oxide was going for about six dollars a ton -- six dollars a pound. Now forty-six hundredths would be eight and a half, nine pounds. That would be around \$54 a ton for forty-six hundredths.

Q. That would be how much per ton?

A. Around \$54 a ton.

Q. \$54 a ton?

A. In 1969.

Q. And your testimony was that mining costs would run how much?

A. \$35 to \$45 a ton.

Q. This would be as of 1969?

A. 1969 they probably ran around \$20.

Q. Well, that \$54 is a '69 figure too?

A. Yes, yes.

Q. I take it this \$20 per ton mining costs in 1969 doesn't include transportation costs.

A. No, it does not.

Q. Do you have any estimate about what your transportation costs per ton would be?

A. At that time the transportation cost I believe ran around \$10 a ton from that area.

Q. Well, the conclusion is obvious then, Mr. O'Brien. If there was a substantial tonnage of .460 uranium oxide in that vein, then it would have been economical for them to mine it and sell it --

A. That's right, it would have been.

Q. -- as of the date of withdrawal or prior to the date of the withdrawal.

A. That's correct.

(1 Tr. 33-35). In subsequent redirect examination, O'Brien reconciled his statement that there had been no discovery with his conclusion that a .460 uranium oxide deposit would have been commercial in 1969 on the basis that there had been no showing of any substantial tonnage to the deposit (1 Tr. 35). 2/ In response to another question from Judge Morehouse as to whether, had he been able to sample the outcrop along its entire length and all the samples had shown good values, he would change his opinion on the validity of the claim, as we noted earlier, O'Brien responded:

It might be some different, but not very much, because there is no depth to it. There is no tonnage involved in this. You have a length on it, but you do not have a depth on it so that you cannot calculate a tonnage that would make it worthwhile to mine. The first thing you have to do in any mine you have to be able to spend money on it. You have to have some knowledge of the total tonnage that is available to mine so that you can be sure that you are going to get your money back when you put some money into it.

(1 Tr. 37). O'Brien estimated that the most you could project the outcrop was 10 to 15 feet (1 Tr. 37).

Contestee Donald F. Crain testified as to the circumstances of the original location of the claims and some of the work which had been done on them. He stated that the outcrop ran approximately 800 feet, though the richer ore tended toward the south end, with the last 100 to 200 feet in the north end quite possibly very low grade (2 Tr. 14). At the request of the Atomic Energy Commission (AEC), Crain had traversed the length of the outcrop, taking measurements of

2/ At the second hearing, O'Brien lowered his estimate of transportation costs to \$6 a ton (2 Tr. 45).

its width every 20 feet and cutting an ore sample every 60 feet. The average width of the mineralized area over the length of the outcrop was estimated at 62 inches. See Exhibit R-3. Crain contended that, as a result of these measurements and samples, the AEC had awarded the claimant an allotment (Allocation No. A-424) for an annual maximum of 29 pounds of U[3]O[8] in ore (Exh. R-4). Crain was unable, however, to obtain the assay results from the samples he submitted to the AEC (2 Tr. 20).

Appellant also submitted the results of various assays taken in the past (Exhs. R-2, R-5, R-6, and R-11). Exhibit R-2 consisted of the results of radiometric analysis by the Bureau of Mines of five samples taken from the claims in 1958. Two of the samples were taken of the outcrop, while three came from the tunnel. The two samples from the outcrop were determined, by radiometric analysis, to contain 1.36 percent and .27 percent U[3]O[8] equivalent, whereas the tunnel samples showed .08 percent, .96 percent, and .02 percent. Crain admitted that the sample from the tunnel which showed .96 percent was taken from a stringer (2 Tr. 25).

Exhibit R-5, an assay report dated July 7, 1961, showed .86 percent U[3]O[8], while Exhibit R-6, an assay report dated August 28, 1963, indicated .637 percent U[3]O[8]. Both of these samples were taken in the same general area as O'Brien's outcrop sample, and the outcrop samples in Exhibit R-2 (2 Tr. 35-36).

Crain testified as to his belief that the tunnel had not been driven sufficiently far into the hillside to intersect the main body of the outcrop (2 Tr. 27). He estimated a total tonnage of 57,000 tons, for which he assumed that the depth that the outcrop extended was 200 feet with a length of 800 feet (2 Tr. 34). When the length was estimated as 600 feet with 2-foot thickness and 200 feet of depth, the total estimated tonnage was 17,000 (2 Tr. 47-49). He admitted that this estimate was "probably a little generous" (Id.).

Crain also submitted a number of documents (Exhs. R-12, R-13, and R-14) which he argued supported his claims' validity. Not only were the authors of these documents not subject to cross-examination, two indicated that they were "attractive" claims, and one (Exh. R-13) stated that the "holdings constitute an attractive uranium prospect that a prudent mining man or company would seriously consider for continued exploration, development and exploitation." We are unable to give these letters much weight towards establishing the existence of a discovery.

There seems little question that the surface showings are good. The question upon which the validity of the two claims would depend is whether there is sufficient quantity to justify a prudent man in the further expenditure of funds with a reasonable expectation of developing a valuable mine. In United States v. Larson, supra, the Board

examined in detail what extrapolations from known facts are permissible in determining the extent of mineralization relating to uranium claims. The Board noted that the AEC utilized four separate standards in classifying uranium ore reserves: measured ore, indicated ore, inferred ore, and potential ore. These groupings were defined as follows:

"Measured ore is ore from which tonnage is computed from dimensions revealed in outcrops, trenches, workings, and drill holes and for which the grade is computed from the results of detailed sampling. The sites for inspection, sampling and measurement are so closely spaced and geologic characters so well defined that the size, shape and mineral content are well established. The computed tonnage and grade are judged to be accurate within limits which are stated and no such limit is judged to differ from the computed tonnage ore grade by more than 20 percent.

"Indicated ore is ore from which figures for tonnage and grade are computed partially from specific measurements, samples, or production data and partially from projection for a reasonable distance on geologic evidence. The sites available for inspection, measurements and sampling are too widely spaced or otherwise inappropriately spaced to outline the ore completely or to establish its grade throughout.

"Inferred ore is ore for which quantitative estimates are based largely on broad knowledge of the geologic character of the deposit and for which there are few, if any, samples or measurements. The estimates are based on assumed continuancy or repetition for which there is geologic evidence. This evidence may include comparison with deposits of similar type. Bodies that are completely concealed may be included if there is specific geologic evidence of their presence. Estimates of inferred ore should include a statement of the special limits within which the inferred ore may lie.

"Potential ore is unexplored extensions beyond inferred ore, or in undiscovered ore bodies, the probable existence of which is deducted from study of local and regional geology and statistics. Estimates of tonnage are obtained by comparing explored areas having similar geologic environment that have been explored or developed."

9 IBLA at 258, n.9.

In *Larson*, the Board specifically rejected the Government's contention that only "measured ore" could be considered in determining

whether a discovery had been made. While noting that "potential ore" could not serve as a basis for discovery, the Board specifically reserved the question of whether "inferred ore" could be deemed acceptable. Id. at 262-63. In United States v. Wells, 11 IBLA 253 (1973), however, a case involving copper claims, the Government mineral examiner testified as to "indicated" and "inferred" ore bodies. Id. at 258. While the majority of the Board accorded no weight to the examiner's testimony, this was premised on the speculative nature of his projections, not on his consideration of "inferred" reserves.

In the instant case, it is clear that "measured ore" reserves are virtually nonexistent. Appellant Crain testified, as we have noted, that he assumed the outcrop extended 200 feet, which even he conceded was a little generous (2 Tr. 34). O'Brien, on the other hand, contended that at most that the outcrop could be extended was 10 to 15 feet (1 Tr. 37). Neither, however, provided any geologic basis upon which their contention could be judged.

This aspect of the instant appeal is notably similar to United States v. Wells, supra. In Wells, as in the instant case, there was testimony as to the extent of a deposit for which the Board could discover no basis. Wells, the Board remanded the case for a further evidentiary hearing as to the extent of mineralization. It must be remembered, however, that Wells was decided prior to United States v. Taylor, supra, in which this Board undertook an exhaustive analysis of the nature of the contest proceedings. We have already discussed the conclusions reached in Taylor and will not repeat them here. Consistent with Wells we hold that, absent an evidentiary framework in the record relating to geologic conditions, the testimony of the mineral examiner as to the extent of the deposit cannot be accorded sufficient weight to constitute a prima facie case. The fact that appellant Crain's testimony is equally without weight matters little, since Crain's testimony cannot be said to have remedied the deficiencies of the Government's case. This being the situation, we will dismiss the contest complaint without prejudice, the issue never having properly been joined. 3/

3/ We are not unaware of the controversy over whether .46 percent ore exists over a mineable width (2 Tr. 60-66). In this regard, however, we agree with appellant Crain that an assumption of no values adjacent to the structure seems unwarranted. O'Brien testified that he sampled only the structure (1 Tr. 11); he did not take a channel sample across a mineable width. Thus, his admitted assumption of no values outside the structure has no discernible basis in fact. In this regard, his evidence can be given no more weight than Crain's conclusion that the values across an entire mineable width would run .20 percent and possibly .25 percent (2 Tr. 66).

Regarding the failure of appellants to develop the claims over a considerable period of time, we have noted that such evidence can independently serve to establish a prima facie case of invalidity. United States v. Hess, *supra*; United States v. Gibbs, 13 IBLA 382, 388 (1973). A case which is totally dependent upon the failure of a mining claimant to develop a claim is, however, a weak case at best. See United States v. Williamson, 45 IBLA 264, 280 (1980). In the instant case, appellant testified that he had obtained an offer to mine the claims from Climax Uranium Company in 1957. Appellant testified that he attempted to consolidate these claims with other less promising ones. He states "I thought that if I leased this one property with this ore body showing to Climax I would have no leverage to induce some other company to take the other claims" (2 Tr. 56-57). The negotiations proved unsuccessful. Moreover, the property had been leased to one William Huff in 1957, who had driven the adit, but had subsequently suffered bankruptcy prior to completion of the tunnel (2 Tr. 26-27). While we hardly find that these statements would compel a conclusion that the claims were valid, we do believe that they are sufficient to overcome the presumption which arises solely on the basis of a lack of production. See United States v. Hess, *supra* at 9.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge declaring the Solitude Fraction and the Circle 'X' lode claims null and void is reversed, and the contest complaint against these two claims is dismissed without

fn. 3 (continued)

While O'Brien stated that 30 hundredths ore was the break-even point in 1969, there is some confusion in the record concerning the computation of this figure. Ore containing .25 percent uranium oxide would contain 5 pounds per ton. This would total \$30 at the going rate in 1969 of \$6 per pound (2 Tr. 63). Assuming mining costs of \$20 per ton in 1969 (1 Tr. 34) and transportation costs of \$6 per ton (2 Tr. 45), there would appear to be a net profit of \$4 per ton. At the second hearing, O'Brien testified that "at the mill they would take 15-hundredths ore, but he milling price for that was around \$8 a ton for the product from the mine" (2 Tr. 63). This figure seems to be directed at .15 percent ore, and thus there is a serious question whether it would be applicable to .25 percent ore. Secondly, we note that utilization of a mining width of 4 feet, which has been deemed acceptable in a number of past decisions of this Board, might well result in a higher value ore (assuming that the higher value ore was in the center vein) in ore in excess of .30 percent utilizing Crain's figures. In short, this testimony is possessed with too many imponderables to serve as a predicate for finding the claims invalid.

prejudice. The opinion of the Administrative Law Judge as to the other 10 claims is affirmed.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

